United Nations AT/DEC/1131

# Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1131

Case No. 1223: SAAVEDRA

Against: The Secretary-General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Brigitte Stern;

Whereas, on 4 October 2001, Rachel Saavedra, a former staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an Application requesting the Tribunal:

"ANNEX II: PLEAS

...

II. On the merits ... *to find*:

(a) that the Secretary-General of ICAO failed to carry out appropriate management procedures whereby, on 20 March 1997 ... he approved a Post Description that did not truthfully reflect the level of responsibility as was indicated in a previous Post Description signed by the Applicant and her supervisor [the Director, Technical Co-operation Bureau (TCB)] on 21 March 1996 ...

(b) that the Applicant has been discriminated against as of 20 March 1997 until 31 May 1998, the date of her retirement ...

(c) that the Respondent denied the Applicant due process ...

III. ... *to order* the Secretary-General of ICAO:

(a) accept the recommendation of the ICAO [Advisory Joint Appeals Board (AJAB)] favourable to the Applicant ...

...

(c) pay the Applicant compound interest ... on the amounts due and owing ...

IV. [To award] the Applicant exemplary and punitive damages for a total amount of $ 150,000 ... as ... compensation for material and moral prejudice due to the mishandling of her case ...

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 15 February 2002 and once thereafter until 22 February 2002;

Whereas the Respondent filed his Answer on 18 February 2002;

Whereas the Applicant filed Written Observations on 12 April 2002;

Whereas, on 1 August 2002, the Respondent submitted comments on the Applicant's Written Observations;

Whereas, on 30 May 2003, the Applicant submitted a further statement;

Whereas the facts in the case are as follows:

The Applicant joined ICAO as a Travel Assistant at the G-7 level in the Office of the Secretary General, Financial Services Section, Finance Branch, on 14 September 1981. With effect from 1 July 1985, the Applicant was transferred with her post to the Technical Assistance Bureau (TAB, now TCB), Management Support Office (MGS).

On 28 August 1986, the Applicant sent an inter-office memorandum (IOM) to the Chief, MGS, claiming that since 1 July 1985, she had "been doing the work of two employees: Travel Officer (P-2) and Travel Assistant (G-7)". She requested that her post be re-evaluated and enclosed a list of the duties she performed. On the same date, the Chief, MGS, wrote on the IOM that he "strongly support[ed] this case for regrading in view of the responsibilities of the post for all of the Organization's travel arrangements".

On 17 June 1988, the Applicant sent an IOM to the Chief, Personnel Branch (PER), requesting a special post allowance (SPA) retroactive to 2 October 1985, as well as a "temporary promotion" as of the same date. In a handwritten note on the IOM, the Director, TAB, rejected her request. The Applicant was so advised by the Chief, PER, on 29 June.

On 29 June 1988, the Acting Establishment Officer prepared an evaluation of the post of Travel Assistant, noting that on 30 June 1987, a request had been submitted for upgrading of the post to the G-9 level; that on 4 November 1987, the request had been replaced by one calling for upgrading to the P-2 level, in view of the prior existence of a P-2 post of Travel Officer, which had been abolished; and, that an updated job description had also been prepared.

Effective 15 July 1988, the Secretary General approved the upgrading of the post to the P-2 level, and agreed that the incumbent be appointed at that level.

On 21 March 1996, a large exercise was initiated by the Secretary General to update the post descriptions in TCB and a draft post description for the post encumbered by the Applicant was prepared and signed by her and the Director, TCB. A number of revisions were made to the 26 March 1996 post description, and the Secretary General signed it on 20 March 1997. However, as the Applicant did not agree with the revisions made, she refused to sign this post description. On 21 March, she wrote to the Secretary General, requesting a personal upgrade to the P-3 level.

In an IOM dated 26 March 1997, the Applicant requested the Secretary General to review her case. On 25 April 1997, he confirmed in a handwritten note on the IOM that " the relevant job description is the one I have signed on 20 March 1997". On the same day, the Director, TCB, advised the Applicant that the job description that was "signed additionally by the Secretary General ... is the only valid one".

On 25 April 1997, the Applicant appealed to the AJAB. The AJAB adopted its report on 15 March 2001. Its conclusions and recommendations read, in part, as follows:

> "8. **CONCLUSIONS OF THE BOARD**
>
> 8.1 The Board recognises that, in accordance with Staff Regulation 2.2, the Secretary General ... acted within his authority and in the exercise of his prerogatives to decide to alter the nature of the duties to be allocated to the incumbent, as well as the type and level of the supervisory relationship.
>
> ...
>
> 8.5 The Board notes, however, that it has the right to review issues pertaining to potential errors of substance and procedural irregularities which might have occurred in the process of reclassification of post including when the Secretary General signed the impugned post description. The burden of proof rests upon the Appellant.

...

8.10 Based upon the examination of the facts and the testimonies of witnesses, the Board concludes that, with the implied consent of [the Director, TCB], the Appellant continued to perform her duties and responsibilities with a considerable degree of independence and with virtually no review or verification of her work by the supervisor, in the same manner as reflected in Section 6 of the unapproved Post Description of 21 March 1996. ...

8.11 The Board recognizes that the Appellant was entitled to have an accurate post description, which appropriately reflected the actual requirements of the post concerned, with respect to the duties and responsibilities to be performed by the incumbent, as well as to the type and level of supervision. ...

8.12 The Board finds that the approved Post Description signed by the Secretary General on 20 March 1997 ... does not reflect an accurate description of the work performed.

8.13 ... The Board concludes that the above findings constitute an **error in substance** of the approved Post Description signed by the Secretary General on 20 March 1997.

9. RECOMMENDATIONS

9.1 ... [T]he Board finds that it must reject the relief sought by the Appellant in so far as it asks that the remedy be applied from 21 March 1996, since the post description which was signed on that date was not approved by the Secretary General. Furthermore, during the course of the hearings, the Appellant offered clarification that the appeal was directed against the approved Post Description of 20 March 1997.

9.2 ... [W]hereas the Board has no opinion as to whether an accurate Post Description would have warranted higher grading, it nevertheless recommends that the Appellant be awarded a Special Post Allowance for the period of 20 March 1997 until the date of her retirement as compensation for having been required to work under an inaccurate post description, plus an amount equal to her costs or US $ 2,500, whichever is less."

On 10 July 2001, the Secretary-General informed the Applicant that he had rejected the appeal.

On 4 October 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Applicant claims that the draft post description signed by herself and the Director, TCB, on 21 March 1996 was an accurate post description, and that the one signed by the Secretary-General (but not by her) on 20 March 1997 did not reflect truthfully the level of responsibilities of the post.

2. The Applicant received unfair and discriminatory treatment as she was not given an objective and complete evaluation of her functions in accordance with pertinent rules and procedures regulating the classification process.

3. The Applicant suffered considerable anxiety, mental anguish and strain caused by inexcusable, deliberate, unjustifiable and unconscionable delays by the ICAO Management in dealing with her request for fair and accurate assessment of her post.

Whereas the Respondent's principal contentions are:

1. It is the view of the Respondent that the post description of 20 March 1997 provided an accurate description of the duties and responsibilities of the incumbent of the post.

2. The Respondent requests the Tribunal to reject the Applicant's claim that she be paid SPA from 21 March 1997 to the date of her retirement.

3. The Applicant has not met the burden of proving "discrimination and unfair treatment throughout the job classification ordeal", nor has she produced any evidence of "inexcusable, deliberate, unjustifiable and unconscionable delays" by ICAO management in dealing with her request for "fair and just assessment of her post" Thus, her claim for compensation should be rejected.

4. The Applicant has not adduced any evidence of her expenses, nor that they exceeded "the normal expenses of litigation" before the AJAB, warranting payment of costs.

The Tribunal, having deliberated from 1 to 25 July 2003, now pronounces the following Judgement:

I. The AJAB recommended to award the Applicant a special post allowance for the period of 20 March 1997 until the date of her retirement as compensation for having been required to work under an inaccurate post description, plus an amount equal to her costs or $2,500, whichever is less. In addition, the Applicant claims compensation for exemplary and punitive damages to Respondent on various scores, for an amount of $150,000.

II. The reasoning behind the AJAB's recommendation is follows:

> "The Board recognizes that the Appellant was entitled to have an accurate post description which appropriately reflected the actual requirements of the post concerned with respect to the duties and responsibilities to be performed by the incumbent, as well as to the type and level of supervision".

The AJAB cites Judgments No. 645, *Fussimanya-Reyna* (1994), and No. 396, *Waldegrave* (1987) of the Tribunal in support of the following contention:

> "although it is not the function of the Tribunal to substitute its judgment for that of the Secretary-General in job classification matters, the Tribunal had jurisdiction to determine whether under all the circumstances, the Respondent has acted within its reasonable discretion".

III. The Board goes on to say that:

> "the approved Post Description signed by the Secretary General on 20 March 1997 contains but a theoretical idea with respect to the supervisory relationship, which ICAO was not in a position to implement within a reasonable period of time and therefore does not reflect an accurate description of the work performed.
>
> The Board advises that the impugned Post Description should have provided an accurate description of the duties and responsibilities required from the incumbent, and the determined level of supervision should have been implemented within a reasonable amount of time. The Board concludes that the above findings constitute an **error in substance** of the approved Post Description signed by the Secretary General on 20 March 1997."

IV. The Tribunal acknowledges that neither the AJAB nor the Tribunal itself can substitute its judgment for that of the Administration. The Tribunal recognizes the Administration's discretion regarding post classification and also job descriptions. The Tribunal's only competence in this respect is to assure that there has been, in the process of classifying, no violation of due process of law, arbitrariness, discrimination or other improper motivation. (See Judgement No. 541, *Ibarria* (1991).

V. The Tribunal, however, does not believe that there has been, on the part of the Administration, an error in substance nor does it share some of the AJAB's conclusions on the matter of supervision in the different job descriptions mentioned in the case.

VI. The Applicant objects to the job description signed by the Secretary General on 20 March 1997. The job description was the end result of a process which began about one year earlier, in 1996, when a job description was apparently prepared by the Applicant (hereinafter referred to as "PD1") which was, needless to say, entirely to her satisfaction. But before submission to the Secretary General for approval, PD1 was submitted for examination to other organs and staff members who usually participate in the task of drafting post description and resulted in the post description of 20 March 1997 (hereinafter referred to as "PD2").

VII. According to the testimony before the AJAB by the Acting Director, TCB, who was, in his own words, "responsible for reviewing the job description of the Appellant as part of a general exercise to review and update all post descriptions in TCB", it was not unusual, in the process of reviewing job descriptions, to change the wording several times before the exercise was finalized. This opinion coincided with the testimony of the Classification Officer, another witness in the AJAB procedure, according to whom the changes in PD1 resulted from an interview with the Chief, Establishment Section (C/EST) in April 1997. "She mentioned that changes could be introduced by different people and at different stages in the process", adding that such changes could have been made "directly by C/EST, for recommendation to the Secretary General".

VIII. The Tribunal is satisfied that, in any case, the ultimate responsibility for the issuing of post descriptions belongs to the Secretary General of ICAO and that it is entirely up to his discretion to accept the suggestions that may be made by the persons with competence who are his advisers on this subject. The Tribunal is satisfied that the procedure of revision of PD1 was entirely regular and not vitiated by improper motivation and that the only valid description of the Applicant's post is that issued by the Secretary General, whether or not it was to the Applicant's liking and whether or not the Applicant signed it.

IX. Whatever the legal value of PD1, the Applicant based her case on two premises, one that PD1 reflected her real functions while PD2 did not, and that consequently she had been working under an inaccurate post description. In order to ascertain the correctness of that statement, and assuming that indeed PD1

accurately reflects her post functions, the Tribunal shall compare the two texts to see whether or not there are differences between them, and if such differences exist, whether or not they have any legal relevance. In fact, the only differences between the two post descriptions argued by the Applicant were those regarding supervision of the incumbent member. In PD1, Section 6, "Supervisory Controls", the language used depicts a task entirely free of supervision for routine affairs, and directs the incumbent to "discuss with the Supervisor" unusual cases. The total independence of the incumbent is expressed in the first sentence, where it is stated that "Work comes directly to the incumbent. ICAO members, of all levels, seek advice from the incumbent directly. Advice is given by the incumbent directly to the staff member." The same may be said of the last sentence, according to which "there is no revision or verification by the Supervisor".

On the other hand, PD2 presents a picture of very light supervision. According to the language used in the first sentence in Section 6, "Supervisory Controls", although work continues to come directly to the incumbent, *special requests may come from the supervisor.* Unusual cases are also discussed with the supervisor. However, in the last sentence, it is stated that "For routine work, supervision is *general and is at the discretion of the supervisor"* (emphasis added). And exceptional (not *unusual*) cases "are submitted to the Supervisor for review and decision". It must be pointed out that *general supervision* is the lower degree of supervision and that the Applicant cannot possibly claim to be under no supervision whatsoever.

X. In the appreciation of the Tribunal, the differences pointed out are too slight for them to have any legal significance. Moreover, they would have to bring some injury to the Applicant. The fact that PD2 describes a post with a slight emphasis on supervision while the Appellant maintains that, in actual life, such supervision depended entirely on her initiative does not seem to impose further responsibilities on the Applicant, on the contrary. If supervision did not come from where it should come, the responsibility for that failure is on the Administration, not on the incumbent. On the other hand, if she felt that a certain case was worth while consulting with her Supervisor, she could do so on her own initiative. That state of affairs is eloquently described by a sentence in PD1, stating that "The incumbent must be able to work independently, methodically, accurately and with attention to details, as there is no review or verification by the Supervisor". This sentence is

absent in PD2, as it is obvious that the less supervision there is, the more responsibility accrues for the incumbent.

XI. The Applicant and later the AJAB seem to put great emphasis on the fact that the Organization could not build up a structure up to the *theoretical* conception that they discover behind the subtle modifications in the supervision clauses. They proclaim that there was an obligation of the Respondent to act in accordance with that announcement in the job description, but in fact, if obligation there was, it was towards the Organization: it may be argued that it could have prejudiced the Organization if, really, supervision was necessary for the better performance of the functions assigned to the Travel Bureau. But this has nothing to do with the matter of the present case, which relates to an alleged injury to the Applicant.

XII. The Tribunal does not believe that the real issue is that as presented by the AJAB or even by the Appellant. The real grievance of the Appellant is that, with a text of the job description as it was finally drafted by the Director General, the post had in the estimation of the Applicant less chances of being reclassified as P3. Her insistence in that the post required more years of experience than was proposed by the Administration and that no supervision was necessary nor, indeed, actually exercised, in relation to the incumbent, was destined to make the post look as more important than the Administration presented it.

XIII. But even after obtaining the text that the Applicant wanted, it would still to be seen whether or not the Administration would have upgraded the post to the P-3 level. That possibility would have remained entirely in the realm of speculation, as it depended on the discretion of the Secretary General. On the other hand, neither the AJAB nor this Tribunal may substitute on this matter their judgment for that of the Secretary General. The Tribunal may find that the Secretary General's discretion was badly used, for instance if there was arbitrariness, discrimination against the Appellant or any other improper motivation, or if due process of law was not observed. The *onus probandi* falls entirely on the Applicant in these cases and the Tribunal is satisfied that the Applicant has offered no evidence in that respect.

XIV. For the reasons above exposed, the Application is rejected in its entirety.

(Signatures)

Julio **Barboza**
President

Omer Yousif **Bireedo**
Member

Brigitte **Stern**
Member

Geneva, 25 July 2003

Maritza **Struyvenberg**
Executive Secretary

SAAVEDRA